

STATE OF MICHIGAN
MACOMB COUNTY CIRCUIT COURT

CUSTOM DATA SOLUTIONS, INC., a
Michigan corporation,

Plaintiff,

vs.

Case No. 2004-3376-CK

PREFERRED CAPITAL, INC., an
Ohio corporation and COMMERCE
COMMERCIAL LEASING, LLC, a New
Jersey limited liability company,

Defendants.

OPINION AND ORDER

Plaintiff has filed a motion for case evaluation sanctions pursuant to MCR 2.403(O)(5). Defendant Preferred Capital, Inc. ("Preferred") requests the Court deny Plaintiff's motion.

This matter involves the sale of telecommunications services and products. Plaintiff entered into a telecommunications services agreement and five equipment rental agreements with Norvergence, Inc., a New Jersey corporation. The equipment rental agreements were for a "matrix" box that Norvergence would install on customer's premises. Norvergence required the rental agreements in order for the customer to receive the total telecommunications services and products package that allegedly would provide telephone, cellular, and internet services at dramatic savings. Two of the equipment rental agreements procured by Norvergence from Plaintiff were assigned to Commerce Commercial Leasing, LLC ("Commerce"). Three of the equipment rental agreements procured by Norvergence from Plaintiff were assigned to Preferred. Plaintiff alleges that Norvergence was unable to provide the telecommunication services to



Plaintiff. Despite this fact, Defendants have attempted to collect under the assigned rental agreements. Plaintiff filed suit against Defendants in an attempt to protect itself from collection under the assigned rental agreements. On September 2, 2004, Plaintiff filed an amended complaint against Defendants, alleging breach of contract in count 1; breach of express and implied warranty in count 2; fraud in the inducement in count 3; innocent misrepresentation in count 4; civil conspiracy in count 5; and declaratory relief in count 6.

On February 13, 2006, Plaintiff filed a motion for summary disposition. On March 2, 2006, Preferred filed a motion for summary disposition. On May 15, 2006, the Court entered an *Opinion and Order* granting Plaintiff's motion for summary disposition, and denying Preferred's motion for summary disposition. On June 9, 2006, Plaintiff filed the instant motion.

Plaintiff contends that case evaluation sanctions are appropriate pursuant to MCR 2.403(O)(5). Plaintiff contends that it accepted the case evaluation award of \$20,000.00 in favor of Plaintiff, and Preferred rejected the award. Plaintiff contends that the Court's finding that the equipment rental agreements were fraudulently induced, and therefore void constitutes as a verdict more favorable to it than the case evaluation award.

Pursuant to MCR 2.403(O), a party who rejects a case evaluation is subject to sanctions if the party fails to improve their position at trial. *Elia v Hazen*, 242 Mich App 374, 378; 619 NW2d 1 (2000). Pursuant to MCR 2.403(O)(5), if the verdict awards equitable relief, costs may be awarded if the court determines that:

- (a) taking into account both monetary relief (adjusted as provided in subrule [O][3]) and equitable relief, the verdict is not more favorable to the rejecting party than the evaluation, and
- (b) it is fair to award costs under all of the circumstances.

In the case at hand, Plaintiff received a case evaluation award in its favor in the amount of \$20,000.00. The Court's May 15, 2006 *Opinion and Order* granted Plaintiff's motion for

summary disposition by declaring the rental equipment agreements to be fraudulently induced. Although Plaintiff succeeded on the merits of the action, the Court is satisfied that Plaintiff has failed to demonstrate that it has improved its position as required in MCR 2.403(O)(5). Consequently, Plaintiff's motion for case evaluation sanctions should be denied.

Based upon the reasons set forth above, Plaintiff's motion for case evaluation sanctions is DENIED. In compliance with MCR 2.602(A)(3), the Court states this matter remains closed.

IT IS SO ORDERED.

DIANE M. DRUZINSKI

Diane M. Druzinski, Circuit Court Judge

Date:

JUL 21 2006

DMD/aac

A TRUE COPY
CARMELLA SABAUGH, COUNTY CLERK

cc: Frederick Berg, Attorney at Law
Leslie Logan, Attorney at Law

BY: *Jaye E. Alden*, Court Clerk